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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and NATHAN A. SAMS, Chairman, A. E. PLUME, Vice-Chairman, TOM R. MOORE, Member, RAYMOND H. FIELDS, Member, E. W. HARPER, Member, JOSEPH TURNER, Member, and MRS. JOHN D. (HELEN) COLE, Member, in their individual capacities and as members of the defendant Oklahoma State Personnel Board; and KEITH B. FROSCO, Director of the Oklahoma State Personnel Board; and the CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, Chairman, RAY C. JONES, Vice-Chairman, and WILBURN CARTWRIGHT, Member, in their individual capacities and as members of the defendant Corporation Commission; and LARRY DERRYBERR, Attorney General of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLANTS

JURISDICTION

This is a civil class action for declaratory and injunctive relief to enjoin the deprivation of the civil rights of

Appellants and all classified employees of the State of Oklahoma, and is authorized by 42 U.S.C. §1983. The Appellee, Oklahoma State Personnel Board, initiated proceedings against each Appellant under color of 74 O.S. 1971 §818 to dismiss each Appellant from his employment with the Corporation Commission of the State of Oklahoma for alleged political activities. Appellants are accused variously of soliciting campaign contributions, seeking out others to engage in political activities and transporting campaign posters. Appellants contend that the blanket prohibitions against political activities in the statute unjustifiably encroach upon the Appellants' First Amendment rights of free speech, assembly and press, and denies equal protection of the laws in that it denies that group of citizens the rights granted to all other state employees and all other citizens, and there is no justification for the distinction. Appellants also contend that the statute divests those classified employees of Fifth and Fourteenth Amendment guarantees of due process of law in that Appellants are denied political liberty without justification. The decision of the Three Judge Court of the United States District Court for the Western District of Oklahoma sustained the validity of 74 O.S. 1971 §818.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 inasmuch as this proceeding challenges the constitutionality of a State statute, and 28 U.S.C. §2281 requires a District Court of Three Judges to determine the issue.

STATEMENT OF THE CASE

Appellants, William H. Broadrick, Jimmy R. Ury and Clive R. Rigsby, are employees of the Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State. They are residents of the State of Oklahoma and of the United States.

The 1959 Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration Act, 74 O.S.A. §801, *et seq.*, which placed the employees of certain named state agencies within the classified service for the stated purpose of rendering their employment subject to merit rather than political allegiance. The Act prohibits the designated agencies from dismissing or suspending classified employees for political reasons, but it authorizes the State Personnel Board to effect dismissal or suspension of a classified employee who is politically active, and even prohibits the expression of political sentiments other than private expressions.

On October 18, 1971, the Personnel Board formally accused each Appellant of prohibited political conduct during the 1970 re-election campaign of Corporation Commissioner Ray C. Jones. The Appellants then sought injunctive and declaratory relief in the United States District Court for the Western District of Oklahoma challenging the constitutional validity of that part of the Oklahoma Merit Act which prohibits political expressions and activities on the part of classified employees as violating their First Amendment rights of free speech, assembly and press; and their Fifth and Fourteenth Amendment rights to equal protection and due process of law.

A Three Judge Court was convened to hear and determine the case. The Court dismissed the cause of action. In so doing, the Court narrowly construed the Act to prohibit only partisan *party* political activities and found that the statute does not restrict public expressions on public affairs and personalities so long as the employee does not channel his activity towards party success.

QUESTIONS PRESENTED

I. May a State constitutionally broadly prohibit State employees from:

(1) Freely and publicly expressing opinions regarding any political party or any political campaign?

(2) Taking part in any political campaign?

(3) Taking part in the management or affairs of any political party?

(4) Being a candidate for nomination or election to any paid political office?

(5) Being an officer or member of a committee of a partisan political club?

(6) Being a member of any national, state or local committee of a political party?

(7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose?

II. May a State constitutionally classify the employees of some, but not all, of its state agencies and broadly prohibit the employees of those agencies from engaging in the activities described above while permitting the unclassified employees of the State, all other public employees and the citizenry at large to freely engage in those activities?

OPINION BELOW

The written Memorandum Opinion below was entered on February 14, 1972, and is officially reported as *William M. Broadrick, et al.* v. *The State of Oklahoma, ex rel. The Oklahoma State Personnel Board, et al.*, 338 F.Supp. 711. The opinion is reproduced in the Appendix to the Jurisdictional Statement beginning on page i.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Appeal involves the First, Fifth and Fourteenth Amendments to the United States Constitution which provide:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Appeal also involves 74 O.S. 1971 §§802, 803, 803.1, 803.2 and 818, which are printed *verbatim* at pages xii through xviii of the Jurisdictional Statement.

ARGUMENT

74 O.S. 1971 §818, sixth and seventh unnumbered paragraphs, is the Oklahoma counterpart to the Federal Hatch Act, 5 U.S.C. §7324 (a). Section 818, *supra*, applies only to "Classified Employees" of the State of Oklahoma. The employees of many state agencies are unclassified and exempt from the proscriptions of the two challenged paragraphs, see Sections 802, 803, 803.1 and 803.2 of Title 74 O.S. 1971, set forth at pages xii through xvi of the Jurisdictional Statement.

The employees subject to the Act are expressly permitted to *privately* express their opinions upon political subjects and to cast their vote at an election. All other political expressions and conduct are prohibited in the broad and vague terms of §818, *supra*. The sixth and seventh unnumbered paragraphs of §818, *supra*, read as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

The issues before this Court may be gathered together in one simple statement: do the prohibitions contained in the sixth and seventh unnumbered paragraphs of Section 818, *supra*, violate the rights of the plaintiffs guaranteed them by the First and Fifth and Fourteenth Amendments of the Constitution of the United States.

The extent to which a legislative body may proscribe political conduct and behavior of classifications of employ-

ees of a city government, state government or federal government has been an issue before the courts since at least 1946. The frequency with which the courts are forced to decide this issue has in the last several years accelerated. Yet, the extent to which a legislative body may proscribe the political conduct and behavior of governmental employees remains in grave doubt and uncertainty. Thus the notation of probable jurisdiction by this Court in the case at bar and in *National Association of Letter Carriers, AFL-CIO* v. *United States Civil Service Commission*, 346 F.Supp. 578, is timely.

In 1946, the United States Supreme Court rendered its decision in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, which held that insofar as the so-called Hatch Act, Section 7324 (a), *supra*, prohibited a governmental employee from serving as a ward executive committeeman of a political party who was politically active on election day as a worker at the polls and a paymaster for the services of other party workers, the Hatch Act did not violate the constitutional rights of the employee.

Since the date of the *Mitchell* case, *supra*, the United States Supreme Court has rendered decisions which have been used by lower federal courts and state courts as a basis for reaching a decision inconsistent with the *Mitchell* case, *supra*. These United States Supreme Court cases are: *Wieman* v. *Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215; *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328; *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790; *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116; *Keyishan* v. *Board of Regents*

of New York, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675; and *Pickering* v. *Board of Education*, 391 U.S. 563, 10 L.Ed.2d 811, 88 S.Ct. 1731.

Fort v. *Civil Service Commission*, 38 Cal.Rptr. 625, 392 P.2d 385, dealt with a provision of the charter of Alameda County, California. The specific language dealt with is as follows:

> "No officer or employee of the County in the classified civil service shall directly or indirectly make, solicit or receive, or be in any manner concerned in making, soliciting or receiving any assessment, subscription or contribution for any political party or any political purpose whatsoever. No person holding a position in the classified civil service shall take any part in political management or affairs in any political campaign or election, or in any campaign to adopt or reject any initiative or referendum measure other than to cast his vote or to privately express his opinion. Any employee violating the provisions of this section may be removed from office." 392 P.2d at 386.

Fort became chairman of a speakers' bureau for the Contra Costa Committee to re-elect Governor Brown and was dismissed from his employment as Director of the Center for Treatment and Education on Alcoholism, County of Alameda, for violation of the above quoted section of the charter of Alameda County.

After reviewing the holding of the United States Supreme Court in the *Mitchell* case, *supra*, the Supreme Court of California with great reliance on *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790, held that the above quoted charter provision in violation of Fort's First Amendment rights. Stated the Court:

"* * * We are satisfied that, in the light of the principles applicable to the freedom of speech and the related First Amendment rights, no sound basis has been shown for upholding a county provision having the breadth of the one before us, which, as we have seen, applies alike to partisan and non-partisan activities and not only to county elections but to all elections and which is not narrowly drawn but is framed in sweeping and uncertain terms that accept only the right to vote and to express opinions 'privately.' " 392 P.2d at 389.

It is submitted that the rights of plaintiff Fort are no greater than the rights of the plaintiffs of the case at bar. It is further submitted that the language of Section 818, *supra,* in depriving the plaintiffs in the case at bar of their rights is almost identical to that of the Alameda County Charter provision referred to in *Fort* v. *Civil Service Commission, of the County of Alameda, supra,* in its denial of plaintiffs' constitutional rights.

Minielly v. *State of Oregon,* 242 Ore. 490, 411 P.2d 69, involved a deputy sheriff who announced his intention to become a candidate for county sheriff at the next election. In furtherance of his political ambitions, Mr. Minielly brought a declaratory relief action to declare unconstitutional the state statutes prohibiting a civil servant from running for elective public office and providing as a penalty for violating such prohibition automatic forfeiture of his civil service position and of his right to the public office. The specific legislative language in pertinent part, is as follows:

"* * * No person employed under civil service, or registered on the eligible list of the classified civil serv-

> ice, of any county coming under O.R.S. 241.020 to 241.990 shall be a candidate for popular election to any public office, unless such person immediately resigns from the position which he then holds under civil service, or, in the case of persons on the eligible list of the classified civil service, unless such persons immediately have their name stricken from such eligible list."

Thus, the Oregon Statute in question in the *Minielly* case, *supra*, is pertinent to the case at bar in that an employee in the classified service in Oklahoma who ran for public office would more than likely "directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose." In addition such employee would specifically be "a candidate for nomination or election to any public office" and would "take part in the management or affairs of any political party or in any political campaign." (Quotations from the sixth and seventh unnumbered paragraphs of Section 818, *supra*).

The Oregon Supreme Court after referring to *Mitchell, supra,* and *State of Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 91 L.Ed. 794, 67 S.Ct. 544, referred to what it called "new concepts of statutory interpretation and construction in the area of First Amendment rights" and cited *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328; *Sherbert* v. *Verner, supra,* and *Wieman* v. *Updegraff,* 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215, and others. The Court stated:

> "It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state's power to limit federal First

> Amendment rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United States Supreme Court. We hold the statutes unconstitutional because of overbreadth. We believe, however, that there would be a compelling state interest warranting the legislature to pass more narrowly drawn legislation. The present statute encompasses too broad a scope and would prevent the plaintiff from becoming a candidate for state, federal or nonpartisan office. It can not be demonstrated that the good of the public service requires *all* of the prohibitions of the present statute."

Kinnear v. *City and County of San Francisco,* 38 Cal.Rptr. 631, 392 P.2d 391, is a case on its facts identical with *Minielly* v. *State,* except arising out of the State of California and which reaches a conclusion identical with that reached by *Minielly* v. *State, supra.*

In the year 1966 the Supreme Court of California once again was called upon to render a decision having to do with political activities of an employee of a governmental agency invoking a so-called "political activity" statutory prohibition. In *Bagley* v. *Washington Township Hospital District,* 55 Cal.Rptr. 401, 421 P.2d 409, the Court held that a state statute providing that:

> "No officer or employee whose position is not exempt from the operation of a civil service personnel or merit system of a local agency shall take an active part in any campaign for or against any candidate, except himself, for an office of such local agency, or for or against any valid measure relating to the recall of any elected official of the local agency."

Plaintiff was a nurse's aid who had been discharged by the Township Hospital District. Nellie Bagley brought an action against the Washington Township Hospital District to enjoin the district from representing to its employees that participation in recall campaigns was unlawful and from threatening or instituting reprisals. Ms. Bagley also sought reinstatement of back wages and punitive damages. The trial court sustained a demurrer to the petition and the Supreme Court of California was urged by the district to affirm the sustaining of the demurrer. The Supreme Court of California, however, chose to find and hold that the demurrer could not be sustained and in doing so, stated:

> "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to destruction by a public employer's insistence that they be waived by contract."

The Court goes on to say:

> "In summary we note that the expansion of government enterprise with its ever-increasing number of employees marks this area of the law a crucial one. As the number of persons employed by government and governmentally-assisted institutions continues to grow the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it. Restrictions on public employees which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which

they require imperil the continued operation of our institutions of representative government."

A series of precedents had been set in the States of California and Oregon concerning the so-called "political activities" prohibition which were then swept to the State of New Jersey. In the year 1967, the Superior Court of New Jersey in *DeStefano* v. *Wilson*, 96 N.J.Super. 592, 122 A.2d 682, held that a rule providing that no fireman shall take active part in politics or political contest or engage in controversy concerning candidates or issues, placed an unconstitutional burden upon the exercise of the First Amendment rights and liberties of the firemen and struck down a certain legislative rule of the fire department which provided:

> "No members shall take an active part in politics or political contests or engage in controversy concerning candidates or issues."

The New Jersey Court, citing precedents of the United States Supreme Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975, *Sweezy* v. *State of New Hampshire*, 354 U.S. 234, 1 L.Ed. 1311, 77 S.Ct. 1203, and referring to *Minielly* v. *State of Oregon*, *supra*, *Wieman* v. *Updegraff*, *supra*, *Fort* v. *Civil Service Commission of Alameda County*, *supra*, *Kinnear* v. *City and County of San Francisco*, *supra*, and *Bagley* v. *Washington Township Hospital District*, *supra*, held that such prohibition violated the plaintiff's rights guaranteed by the United States Constitution. The New Jersey Court stated:

> "The 'overbreadth' of Rule 128 is obvious. It is not drawn with that degree of specificity which is required

in order to sustain the restraints which it imposes upon the exercise of constitutional rights. Rule 128 effectively deprives plaintiff of his right as a citizen to participate in any phase of political life. It not only prevents him from running for public office and participating in political campaigns, but is *(sic)* also deprives him of his constitutional right to speak freely on public questions, issues and controversies. This is not consonant with the American tradition of recognizing an individual's right to 'speak out and be heard.' The court concludes that Rule 128 is unconstitutional."

In the year 1971, the United States District Court for the Northern District of Ohio, Western District, was asked to decide the issue. Members of the City Police Department brought a class action for declaratory judgment concerning the constitutionality of a State Statute, a City Charter provision, a Civil Service rule, and a City Police Department regulation pertaining to public employee's political activities. After wading through a quagmire of state statutes, city charter provisions, civil service rules and city police department regulations, the Court held that provisions of the police department regulations prohibiting employees from serving on political committees, promoting candidacy of persons, speaking at political meetings, soliciting votes, making public attack on candidates, circulating petitions for candidates and engaging in political discussions while on duty or in any station house with anyone, failed to meet constitutional requirements. The Court in *Gray* v. *City of Toledo*, 323 F.Supp. 574, cites the *Mitchell* case, *supra*, and states that:

"* * * This Court is constrained to follow these rulings." (323 F.Supp. at 1285)

The United States District Court in Ohio then goes on to state:

> "However, any restriction imposed by the government upon its employees' political activity must be directly related to the goal of prohibiting partisan political activity, the effect of which interferes with the efficiency and integrity of the public service. If no such relationship exists, the regulation must be struck down as violative of the first amendment rights of the employees. The more remote the relationship between a particular activity and the performance of official duty, the more difficult it is for the government to justify the restriction on the grounds that there is a compelling public need to protect the efficiency and integrity of the public service. Fort v. Civil Service Commission, 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385 (1964); Minielly v. Oregon, 242 Or. 490, 411 P.2d 69 (1966). In addition, a government's right to infringe upon first amendment rights must be so circumscribed as not, in attaining a legitimate end, to unduly infringe upon protected rights. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)." 323 F. Supp. at 1285.

The United States District Court then goes on to state that:

> "The first sentence of both the Charter provision and the Civil Service Rule prohibits the specified employees from soliciting or receiving contributions, etc. 'for any political party or political purpose. * * *' That portion dealing with 'political purpose' is ambiguous—it encompasses both protected and non-protected activity and is, therefore, overreaching. The phrase 'political purpose', which is presented in the disjunctive, is not limited to conduct regarding partisan officers and issues but relates equally to all candidates and

questions, whether or not they are identifiable with a political party. Fort v. Civil Service Commission, supra; Kinnear v. City of San Francisco, 61 Cal.2d 341, 38 Cal.Rptr. 631, 392 P.2d 391 (1964). The latter activity is, of course, protected speech. Its bearing upon the efficiency and integrity of the public service is dubious at best and is violative of the plaintiffs' first and fourteenth amendment rights."

And at page 1288, the Court states further:

"Ambiguous words touching upon first amendment rights also suffer the constitutional infirmity of vagueness. The naked use of the words 'political' and 'politics' leaves a police officer in a very precarious position. He must venture a guess as to which activities are encompassed by these words as used in Rule 12. Once he acts, he does so at his peril, always in fear that his superiors in the department will not agree with his particular interpretation of the Rule. Or of equal importance, he could engage in self-censorship by denying himself the opportunity to engage in protected political activity for fear that such activity would later be deemed activity which is not protected by the first amendment. cf. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). This problem of vagueness is not remedied by saying that the policeman could first request a reading as to the propriety of his actions from his supervisors. This would vest his supervisors with unfettered discretion in determining which desired activity is permissible under the Rule."

The Court then concludes with the holding that the rule or regulation of the police department does not exclude from its operation public criticism of the police de-

partment or public officials that is not of a disruptive nature and it is therefore unconstitutional on the basis of vagueness, as well as its being overreaching. The Court states, and this is very important, at page 1289, that:

> "* * * Not only is the restriction applicable to both partisan and nonpartisan political discussion, but the City has no legitimate interest in restricting an employee's right to discuss partisan politics during working hours. This is an unconstitutional gagging of a policeman's right to free speech and expression. The Hatch Act reserves to the employee the right to express his opinion on all political subjects and candidates so long as such activity is not directed towards party success. United Public Workers of America v. Mitchell, supra, 330 U.S. 75, at 100, 67 S.Ct. 556, 91 L.Ed. 754. The City of Toledo cannot go beyond this limitation."

Gray v. *City of Toledo, supra,* has been cited both in Appellee's trial brief and in the trial court's Memorandum Opinion in the case at bar. Appellants are at a loss to understand how, from a thorough reading of *Gray* v. *City of Toledo, supra,* such opinion and decision can be cited as in support of their argument and judgment respectively.

Gray v. *City of Toledo, supra,* was decided in March, 1971. In September of the same year, the United States Court of Appeals for the Fifth Circuit in *Hobbs* v. *Thompson,* 448 F.2d 456, was met with a very similar issue and it is submitted has rendered the most exhaustive analysis with respect to this issue to date.

Various individual firemen, including plaintiff, had attached to their automobiles bumper stickers which evidenced support for a particular candidate in the state's

General Assembly primary election. After two firemen were temporarily relieved from duty, all of the firemen were ordered to remove their bumper stickers under the authority of a certain provision of the Macon, Georgia City Charter which provided that no employee of the City's fire department

> "shall take an active part in any primary or election and all (such) employees are hereby prohibited from contributing any money to any candidate, soliciting votes or prominently identifying themselves in a political race with or against any candidate for office."

The City Charter of Macon, it might be added, provided for certain prescriptions which were somewhat less severe than the Oklahoma Statute concerned in the case at bar in that it provided for a reprimand, deduction of pay, suspension from duty, reduction in rank, dismissal from the department, or any one or more of said penalties. This type of prescription it is suggested is much more flexible and fair than the prescription set forth by the Oklahoma law which is simply dismissal from employment. (The last unnumbered paragraph of §818, *supra*, at p. xviii of the Jurisdictional Statement.) The opinion rendered by the Honorable Goldberg, Circuit Judge of the United States Court of Appeals for the Fifth Circuit sets forth an exemplary brief of the law surrounding the issue at hand in the case at bar and if this Appellant may be permitted, it would adopt the analysis of Judge Goldberg by reference.

Of particular significance, Appellant refers this Court to the language of *Hobbs* v. *Thompson, supra,* wherein the Court states:

"* * * But, as *Pickering* teaches us, where the political activities of the public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his first amendment rights as a 'member of the general public', 391 U.S. at 572-573." 448 F.2d at 475.

Mancuso v. *Taft* was decided in April, 1972, by the United States District Court for the District of Rhode Island and is reported at 341 F.Supp. 574. A police officer who became a candidate for nomination for representative to state General Assembly was in apparent violation of sections of the city charter and he sought injunctive relief enjoining city officials from suspending or removing him from classified service and for a declaration that such charter provisions were unconstitutional. Both sides filed motions for summary judgment and the United States District Court held that the city charter provisions which prohibited any officer or employee of the city from becoming a candidate for nomination or election to any public office and from taking any part in the conduct of any political campaign, and which were not limited to partisan political activity or candidacy, were unconstitutional for violation of the First Amendment. Consequently, the plaintiff's motion for summary judgment was granted.

In *Mancuso* v. *Taft, supra,* the Court deals extensively with *Mitchell,* and after considerable analysis and soul-searching states:

"* * * There comes a point where the vitality of a case, though that case has not been expressly overruled, may be seen to have been vitiated by the force of subsequent decisions. I believe that point has been

reached. In the conflict between adherence to the doctrine of stare decisis and my obligation to apply the Constitution as an organic document evolving with the society it governs, I conclude, after much troubling thought and concern, that the Mitchell standard of review, in justice, cannot be applied here."

It is submitted that in its essence *Mancuso* v. *Taft, supra,* cannot be distinguished from the case a bar.

Finally comes the decision and opinion rendered by the United States District Court for the District of Columbia in *National Association of Letter Carriers, AFL-CIO* v. *U. S. Civil Service Commission,* D. C., 346 F.Supp. 578. Herein a Court finally found the specific "political activities" language of the Hatch Act, *supra,* to violate the rights guaranteed to individuals by the Constitution of the United States. The "chilling effect" doctrine is treated with considerable attention. *Hobbs* v. *Thompson, supra,* and *Mancuso* v. *Taft, supra,* are cited. Finally the Court states that:

> "Accordingly, the Court declares 5 U.S.C. § 7324(a)(2) of the Hatch Act unconstitutional in that its provisions are impermissibly vague and overbroad when measured against the requirements of the First Amendment to the Constitution. The injunction against enforcement is granted and a stay of this Order is granted pending determination by the Supreme Court of the United States. So ordered."

Determination by the Supreme Court of the United States is at hand.

The court below in the case at bar relied strictly upon *Mitchell, supra,* and *Gray* v. *City of Toledo, supra.* No treatment whatsoever was given to the other cases cited herein

and the court below fails to analyze or discuss the basic issues underlying the rights of the plaintiffs guaranteed by the First, Fifth and Fourteenth Amendments of the Constitution of the United States. (The opinion of the court below is set forth in *verbatim* at the appendix pages i through xi of the appendix to the Jurisdictional Statement herein.)

The Oklahoma Merit System of Personnel Administration Act is similar in most respects to the Federal Civil Service Act (Hatch Act), and the civil service and merit acts of many states, counties, municipalities and other governmental sub-divisions. It typifies efforts over the past few decades to correct the evils of the spoils system of government. They attempt to achieve basic standards of competency in filling positions of employment in government rather than filling those positions on the basis of political loyalty and allegiance to successful candidates and political parties. They are designed to attract more qualified personnel by insuring job security free of the political fortunes and vicissitudes of the elective process.

The statute challenged herein prohibits discrimination against a classified employee for political reasons; it prohibits political coercion against a classified employee; it prohibits political extortion. Plaintiffs do not challenge those admittedly commendable features of the statute.

Plaintiffs challenge those portions of the statute which attempt to render classified employees politically sterile; which prohibit them from freely expressing their views about any and all political issues and candidates; which prohibit them from taking *any* part in the affairs of any

political party or *any* political campaign; which prohibit them from being interested in any manner in soliciting or receiving contributions for any political party or any political campaign at any level of government—national, state, county, municipal or school district. The statutory language is so vague and broad that the defendant State Personnel Board has even, by rule, prohibited classified employees from wearing lapel buttons and displaying bumper stickers on vehicles operated or controlled by them, and has, by the proceedings against these plaintiffs, implied that a classified employee may not even transport campaign posters. (See Defendant's Exhibit 1 at page 237 of Record on Appeal.)

No compelling state purpose is served, nor is any legitimate purpose of the Merit Act served, in prohibiting a classified employee from freely expressing his convictions concerning candidates for public offices, national, state and local, which exercise functions that vitally affect the life of each citizen, including each classified employee. Interest and participation in political campaigns for or against candidates or issues is the hallmark of good citizenship. Apathy—not active interest—is the real enemy of democracy. Paradoxically, an unchallenged portion of Section 818, *supra*, expresses a legitimate purpose of the Act by prohibiting discrimination against a classified employee because of his political opinions or affiliations. The challenged paragraphs contradictorily render the expression of those opinions or affiliations ground for dismissal from employment.

CONCLUSION

In conclusion, plaintiffs respectfully submit that the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Hatch Act and to the extent it is distinguishable, said Act is sufficiently overbroad and sufficiently vague and the classification sufficiently arbitrary that the rights guaranteed plaintiffs by the First, Fifth and Fourteenth Amendments of the United States Constitution makes said provisions unconstitutional. In addition, plaintiffs submit that *Mitchell, supra,* fails to enunciate the current law as said case applies to the First, Fifth and Fourteenth Amendment rights of the plaintiffs in the case at bar.

WHEREFORE, plaintiffs ask this Court to reverse the judgment of the trial court with instructions to enter an order enjoining the defendants from proceeding further in the dismissal actions against the named plaintiffs.

Respectfully submitted,

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January, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

The Honorable Larry Derryberry,
State Attorney General,
State Capitol Building
Oklahoma City, Oklahoma 73105

Keith B. Frosco, Director
State Personnel Board
407 Sequoyah Memorial Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
and
Harvey Cody, Conservation Attorney
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

all parties required to be served, by mailing such true and correct copies, postage prepaid, this 22 day of January, 1973.

TERRY SHIPLEY

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for Themselves and for the Class, "Classified Employees Within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL. THE OKLAHOMA STATE PERSONNEL BOARD, and Its Members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and Its Members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANSWER BRIEF

STATEMENT OF THE CASE

In 1959 the Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration. Codified as 74 O.S. 1971, Sections 801 to 839, both inclusive, as amended, Section 818 provides:

"No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious

opinions or affiliations or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"No person shall use or promise to use, directly or indirectly, an official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

"No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or

proposed promotion to, or any advantage in, a position in the classified service.

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the ap-

pointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

Paragraphs six and seven of Section 818 contain prohibitions against political activity. The Oklahoma State Personnel Board, created by Section 804 of the Merit System of Personnel Administration Act, is an agency of the State of Oklahoma and is authorized under Section 805 of the Merit Act to "Investigate alleged violations of the provisions of this Act and such rules and regulations as may be adopted subsequent thereto when deemed advisable."

Pursuant to said authority and paragraph eight of the Act the State Personnel Board met in open meeting on October 15, 1971, and voted unanimously that plaintiffs be charged with violating the provisions of Section 818 relating to prohibited political activity. On October 18, 1971, notices were sent to each of the plaintiffs specifying the charges made against them (Appendix, pages 7-11). On November 4, 1971, plaintiffs filed an action in the United States District Court for the Western District of Oklahoma contesting the constitutionality of Section 818. On November 16, 1971, after receiving a request for a hearing from plaintiffs, amended notices were sent to plaintiffs by the Personnel Board reiterating the charges against them and specifying the Oklahoma Statutes under which the hearing would be conducted (Appendix, pages 30-38). On December 1, 1971, pursuant to a request by plaintiffs for a more detailed description of the charges, the Personnel Board furnished more detailed descriptions by separate letters to each plaintiff (Pretrial Order at page 101 of Record on Appeal).

Upon application of plaintiffs to the Personnel Board for a stay of the hearings on the prohibited political activity charges against plaintiffs, the Personnel Board entered an order on December 16, 1971, continuing said hearings until the constitutionality of Section 818 had been determined by the District Court (Order of Board at page 89 of Record on Appeal).

A three-judge court was convened to hear the case and on February 14, 1972, the Court issued its Memorandum Opinion upholding the constitutionality of paragraphs six and seven of Section 818 (Jurisdictional Statement, pages ii-xi). From that decision plaintiffs lodged a timely appeal with this Court which issued an order noting probable jurisdiction on December 11, 1972.

INTRODUCTION AND SUMMARY

Although appellants urge that the sixth and seventh unnumbered paragraphs of 74 O.S. 1971, §818, are unconstitutional under the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and that this Court's holding in *United Public Workers* v. *Mitchell*, 330 U.S. 75, is no longer valid due to its being eroded by lower federal court decisions, the issues raised in this case do not question the right of the State of Oklahoma to constitutionally restrict state employees' active involvement in political partisanship. The issues that are raised relate to the method chosen by the State of Oklahoma to define the prohibited political activities and whether said statutory enactment was drawn with enough specificity to appraise reasonable men of the extent of the prohibitions and

to insure that constitutionally protected rights are not proscribed.

Enacted in 1959 Section 818, modeled after the Federal Hatch Act which prohibits certain partisan political activities of federal employees, provides in unnumbered paragraphs six and seven as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his veto."

The objectives in providing such prohibitions are to insure the immunity of civil service from political control in order to promote, protect and preserve the efficiency and integrity of the public service. *Mitchell, supra.*

Not only do such prohibitions allow our state government to function free from political parties' attempts to use state employees as a tool to achieve party goals, and thus interfere with efficiency and objectivity of state gov-

ernment, they also provide a means of protecting the employees from direct and indirect political pressure. The rationale for having a merit system of personnel administration in Oklahoma is based upon the concept of employees working in an environment where progress is achieved through their own merit, free from the influences of politics. In order to achieve this goal the nature of the prohibition has to be all inclusive; to adopt a lesser standard would allow the subtle pressures of politics to control the employee and state government.

The District Court correctly ruled that the prohibitions against political activity contained in Section 818 are not vague or overbroad. In holding that said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten the efficiency and integrity of the public service and do not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success, the Court gave effect to the provisions of the statute and the intent of the Oklahoma Legislature. The provisions do not attempt to set out all factual situations that would fall within the prohibitions, the impossibility of that being evident; they do, however, provide specific guidelines to the employees so that they are adequately informed. In the administration of the provisions by the State Personnel Board, the Board provides advisory opinions upon request and circulates written materials to all state employees defining specific situations where the prohibitions apply, as derived from prior hearings under the statute, State At-

torney General's opinions, rules of the Board and Section 818 itself.

The State Personnel Board has authority to enact rules and regulations to give effect to the provisions of Section 818. (74 O.S. 1971, §§805(2), 839). The enactment of rules to set forth definitions of what is active participation in partisan politics gives the State Personnel Board the ability to alter these definitions to be consistent with First Amendment rights as determined in rulings by this Court. Any constitutional defect in those definitions could be raised by aggrieved employees in court on a definition by definition basis. To abrogate this method of keeping employees informed of prohibited activities would force the State to cover all possible situations by statute, an impossible task that, in time, would leave the State with fixed definitions perhaps constitutionally defective in light of this Court's future decisions in the area of the First Amendment. The advantage to providng all prohibited situations by statute would be questionable as far as informing employees of the nature of the prohibitions. The system in effect adequately informs the employee of the application of a factual situation to the law. The prohibitions contained in Section 818 are not unconstitutionally vague or overbroad.

The governmental interest in keeping the evils of partisan politics out of state government while allowing the citizens of Oklahoma to have their will expressed through some state employees is a reasonable and just distinction for having the political activity provisions apply only to the class of employees under the merit system.

ARGUMENT

I.

THIS COURT'S DECISIONS CONCERNING THE FEDERAL HATCH ACT AND THEIR EFFECT ON SECTION 818.

In *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, this Court reviewed the Federal Hatch Act prohibitions against active involvement in partisan politics and made the following observations:

(1) That Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service, 330 U.S. at 96-103;

(2) that the constitutional guarantees of free speech and association are not absolutes—a court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evil of political partisanship by governmental employees, 330 U.S. at 95-96;

(3) that the Hatch Act allows federal employees to participate in poltical decisions at the ballot box and prohibits only the partisan activity that would threaten efficiency and integrity and does not restrict public and private expressions on public affairs and personalities, not an objective of party action, so long as the employee does not channel his activity towards party success, 330 U.S. at 99-100;

(4) that the determination of the extent to which the political activities of governmental employees shall be regulated lies with Congress and courts will interfere only when the regulation passes beyond the permissible limitations, 330 U.S. at 102.

In sustaining the constitutionality of the Hatch Act prohibitions against federal employees, the Court in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, also upheld the application of the Act as against state employees working in federally funded programs. Accepting the ruling of the Court in *Oklahoma*, the Oklahoma Legislature in 1959 enacted the Oklahoma Merit System of Personnel Administration and included prohibitions against active partisan political activity on the part of those state employees under the protection of the Merit System. Since not all state employees are under the protection of the Merit System, the prohibitions in paragraph six of Section 818 against "unclassified" employees relate to their soliciting monies for partisan politics from classified employees.

The intent of the Oklahoma Legislature in enacting a Merit System with prohibitions against partisan politics was to provide protection to the state government and employees against the evils of partisan politics that had been in effect prior to 1959. Being very cognizant of this Court's decisions in *Mitchell* and *Oklahoma*, the State utilized the language of the Federal Hatch Act. The case at bar is the only time the statute has been construed by any court and it is only the second time in the history of the prohibitions that any charges have been brought against state employees for violating same. The State of Oklahoma has been relying on this Court's decisions in *Mitchell* and *Oklahoma* as a basis for the validity of its prohibtions and the rule-making authority of the State Personnel Board to keep political activity definitions in line with the Court's First Amendment decisions.

II.

THE POLITICAL ACTIVITY PROHIBITIONS IN 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

In ruling on the issues raised by the plaintiffs in District Court, the three judge panel correctly held that Oklahoma's political activity provisions are not unconstitutionally vague or overbroad. From the testimony of witnesses and the introduction of exhibits, the District Court found as a matter of fact that reasonable men do not differ as to the interpretation of the provisions of paragraphs six and seven of Section 818; that said prohibitions are understood by reasonable men to prohibit state employees from being involved in prescribed partisan political activity and that they do not prohibit state employes from being involved in non-partisan political activity. (District Court Opinion, page viii of the Jurisdictional Statement). The Court below appropriately found as a conclusion of law that the constitutional guarantees of free speech and association are not absolutes and this Court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evils of partisanship by state employees. A government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling government interest is sufficient to justify some encroachment upon an individual's First Amendment rights. (District Court Opinion, page x of the Jurisdictional Statement). The Court further

found that the provisions of unnumbered paragraphs six and seven of Title 74 O.S. 1971, §818, prohibiting political activity by state employees, are directly related to the State's goal of prohibiting partisan political activity. Said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten efficiency and integrity and do not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success. These prohibitions do not unduly infringe upon protected rights under the First Amendment to the United States Constitution. (District Court Opinion, page x of the Jurisdictional Statement).

In answer to appellants' urging that *Mitchell* was no longer valid because of lower federal court decisions inconsistent with the *Mitchell* case, the District Court properly found their claim untenable in holding that an inferior court can never "erode" a decision of the United States Supreme Court. The premise of the Court's holding in *Mitchell* is still valid; the evil of partisan politics exists today as much or more than in 1946. The method utilized by the State of Oklahoma in prohibiting same is consistent with the constitutional rights of state employees.

A. PARAGRAPHS SIX AND SEVEN OF 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY VAGUE.

Oklahoma's political activity prohibitions are attacked as being unconstitutionally vague; appellants contend they do not know the political activities in which they can participate or those that are prohibited. In *Grayned* v. *City of*

Rockford, 408 U.S. 104, 108-109, this Court examined the question of vagueness and set forth the following guidelines:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " (Footnotes omitted.)

The most obvious way to prevent a vagueness problem is to set out specifically all the prohibited activities. To have this as a constitutional requirement is neither practicable nor desirable. In being guided by the standards in *Grayned* we must first determine if a man of average intelligence can reasonably determine what is prohibited. This determination is not limited to scrutiny of the wording of the statute, but also interpretation of the statute by those charged with enforcing it and scrutiny of other au-

thoritative construction. *Ehlert* v. *United States*, 402 U.S. 99, 631-632; *Law Students Research Council* v. *Wadmont*, 401 U.S. 154, 162-163; *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96; *Gooding* v. *Wilson*, 405 U.S. 518, 520-521. While there have been no court cases interpreting the provisions of Section 818, the State Personnel Board informs all state employees under the Merit System of specific conditions where the prohibitions apply and what activities are not prohibited. In addition, the Board renders advisory opinions on request. While an advisory opinion would not in and of itself invalidate a facial attack on Section 818, it provides a means of ascertaining the effect of the prohibitions on political activity not covered under disseminated circulars or rules of the Board. *Seagrams & Sons* v. *Hostetter*, 384 U.S. 35, 49.

As the enforcing agency the Personnel Board is authorized to enact rules and regulations to give effect to the prohibitions in Section 818. Title 74 O.S. 1971, §805(2) provides in part for said Board to:

> "Adopt, initiate the adoption of, approve, modify, reject, or establish such rules and regulations as may be necessary to give effect to the merit system of personnel administration as contemplated by this Act . . ."

In addition Section 839 of Title 74 provides:

> "Any provision of this Act, or of Chapter 27, Title 74 O.S. Supp. 1959, §§801 to 819, inclusive, entitled 'Merit System of Personnel Administration,' which conflicts or is inconsistent with the federal rules, regulations, or standards governing the grant of federal funds to any agency or department is not applicable to such agency or department; the State Personnel Board

is authorized and directed to vary the terms of its rules and regulations as applicable to agencies and departments of the State receiving grants from the Federal Government, or any agency thereof, to the extent necessary to enable such agencies or departments to comply with the conditions for Federal Grants."

The Personnel Board has by rule defined prohibited activities under Section 818 (Appendix, pages 28, 29). Under Section 839 the Personnel Board is required to have its rules comply with federal requirements. Under *Oklahoma v. Civil Service Commission,* 330 U.S. 127, the conditions of federal grants require the application of the Hatch Act to state employees. Therefore, in enacting rules or interpreting the provisions of Section 818, the Personnel Board has to comply with Hatch Act provisions and is guided by same in the enforcement of the prohibitions.

The listing of prohibited and non-prohibited activities by the Personnel Board in circulars to state employees and definitive rules enacted under Section 818 do not, by any means, cover the whole area of prohibited political activity under the statute. The impossibility of listing in the statute or by rule the myriad activities that are contemplated in keeping the evils of partisan politics out of state government forces the State of Oklahoma to achieve is goal by setting up a system that will adequately advise employees of the prohibited acts. As stated by this Court in *Grayned v. City of Rockford,* 408 U.S. 104:

> "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity.' . . ."

The second standard set out in *Grayned* is that the law must provide explicit standards for those who enforce them. The Personnel Board is guided not only by the language of Section 818, which sets definable standards in regard to employees retaining their right to vote, publicly expressing opinions (not channeled towards party success) on issues and personalities, and allowing involvement in non-partisan political activity. In addition the Board is governed by those standards established by State Attorney General opinions, definitive rules enacted by the Board itself, and the direction given by the Federal Hatch Act provisions through Section 839, Title 74 of the Oklahoma Statutes and *Oklahoma* v. *Civil Service*.

Because of the nature of the prohibitions and the countless factual situations that would constitute a violation of the prohibitions, the Personnel Board, as do all other enforcement agencies, must apply the factual situation to the legal principles set out and determine if there has been a violation. In *National Association of Letter Carriers, AFL-CIO* v. *United States Civil Service Commission*, 346 F.Supp. 578, 595, Circuit Judge Mackinnon commented on the vagueness attack on the Federal Hatch Act in his dissent in saying:

> "The statutory standard here is in many respects analogous to a legislature's adoption of a criminal statute against such a common law crime as fraud—no attempt is made to define 'fraud'; rather the long-existent body of judicial interpretations of the concept of fraud are impliedly incorporated."

The third vagueness standard this Court set out in *Grayned* relates to the specificity required when regulating

First Amendment freedoms. Curtailment of state employees political activities does have a limiting effect on their First Amendment rights. Given the compelling governmental interest in keeping the evils of partisan politics out of state government, great care must be taken not to infringe too far upon those rights. As indicated previously, in addition to the language of the statute, state employees are guided by Personnel Board rules defining political activity and circulars distributed by the Board setting forth activity that is prohibited and activity that is not prohibited. State employees also have access to advisory opinions upon request. The vagueness concept in this instance turns on whether the state employees have adequate notice of the political activities prohibited in Section 818. In order to meet this notice requirement is the state obligated to set forth every conceivable form of political activity that is prohibited? We contend the standard is not that strict. "Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Products Corporation,* 372 U.S. 29.

The advantage to having these prohibited activities specifically set out by statute in order to give the state employees notice is questionable. Said enactment would not give the employees any more guidance than they now have on prohibited activities.

B. PARAGRAPHS SIX AND SEVEN OF 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY OVERBROAD.

Vagueness and overbreadth arguments are closely related and are both used to invalidate statutes impermissibly encroaching on First Amendment rights. An overbroad statute is one which regulates constitutionally protected speech or conduct as well as that which is not constitutionally protected. As stated by this Court in *Younger* v. *Harris*, 401 U.S. 37, 51:

> "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

This use of narrowing construction to exclude from the prohibitions contained in the statute constitutionally protected speech may be the approach this Court should take in construing Section 818. However, we feel that a correct interpretation of the intent of the Oklahoma Legislature will prevent facial invalidation. State employees need not restrict their First Amendment activities because of uncertainty about the prohibitions on their political activity. As we have previously shown, a state employee can understand what activities are prohibited; the facial prohibitions as further defined by rule, circular and advisory opinions allow an employee to ascertain the extent of the prohibitions.

In determining whether the specific provisions of Section 818 facially encompass constitutionally protected po-

litical activity we must look to the wording of the statute. Paragraphs six and seven of Section 818 provide:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Basically the problem lies with the use of the words "political" and "politics." Do these words refer to "the science of government and civil polity" or are they used in the narrower sense of referring to "political affairs in a party sense"? If the former is the proper interpretation, the provisions are overreaching. If, however, these words are used in a partisan sense, the activity which is prohibited is non-protected speech under the guidelines set forth by this Court in *Mitchell, supra.* Where the words "politics" and "political" are modified by an adjective that connotes partisanism, the restricted activity is not so protected. *Gray* v. *City of Toledo,* 323 F.Supp. 1281, 1288.

The provisions in paragraph six of Section 818 against solicitation or accepting any "assessment, subscription or contribution for any political organization, candidacy or other political purpose" are necessary prohibitions, the purpose of which is best expressed in *Ex Parte Curtis*, 160 U.S. 371, 375, wherein the constitutionality of this type of statute was considered. The Court there said:

> "If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and in this way the government itself may be made to furnish, indirectly, the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republic form of government, and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power."

While the phrases "political organization," "candidacy" or "other political purpose" do not specify that the prohibition is against partisan politics only, the purposes and intent of enacting such a statute prohibiting political activity on the part of state employees is to safeguard against the evils of political partisanship.

In *U. S.* v. *State of Md. for Use of Meyer*, 349 F.2d 693, 695, the Court stated:

> "We should give the language a meaning, if the words will bear it, which carries out the purposes of the statute, even though this is not the literal meaning of the words when considered in isolation."

See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-544; *United States* v. *Shirey*, 359 U.S. 255, 260-261.

This Court in *Richards* v. *U. S.*, 369 U.S. 1, 11, said:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and its object and policy.' "

See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285; *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288.

We contend that the provisions of Section 818 as a whole and the very enactment of the provisions by the legislature to prohibit involvement in partisan political activity gives particular meaning to the phrases "political organizations," "candidacy" or "other political purpose" and limit their prohibition to partisan political activity.

In regard to the use of the phrase "political party" in paragraph seven of Section 818, the Court in *Cooper* v. *Cartwright*, 200 Okla. 456, 195 P.2d 290, 294, stated:

> " 'Political parties' are voluntary associations of electors having an organization and committee, and having distinctive opinion on some or all of the leading

poltical questions of controversy in the state, and attempting through their organizations to elect officers of their own party faith and make their political principles the policy of the government. They are governed by their own usages and establish their own rules."

Certainly this definition of "political party" does not include non-partisan political activity. In striving to make their political principles the policy of the government, persons belonging to said party clearly are promoting partisan needs. An employee of the state who was a member of a committee of said party would be involved in the very partisan political activity that the state prohibits. The prohibition pertaining to political party activity is partisan by definition and may properly be regulated. *Gray* v. *City of Toleda, supra.*

Neither can there by any question that the term "partisan political club" in paragraph seven of Section 818 properly prohibits non-protected speech under the guidelines set forth in *Mitchell, supra.*

The prohibition in paragraph seven above against an employee becoming a candidate for public office does not run counter to an employee's First Amendment rights. The right to engage in politics and political discussion is not absolute. The relinquishment of the right to become a candidate for public office may constitutionally be made a condition of public employment. *Gray* v. *City of Toledo,* 323 F.Supp. 1281, 1288; *Wisconsin State Employees Association* v. *Wisconsin Natural Resources Board,* 298 F.Supp. 339, 349-350; *Stack* v. *Adams,* 315 F.Supp. 1295; *Johnson* v. *State Civil Service Dept.,* 280 Minn. 61, 157 N.W.2d 747, 749-753.

The State Personnel Board in further defining the prohibition promulgated rule 1209.2 of the rules and regulations of the Merit System of Personnel Administration providing:

> "Any classified employee shall resign his position prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party, partisan political club or organization or serving as a member of any such group or organization."

In showing a compelling public need to protect a substantial public interest the Oklahoma Legislature could reasonably conclude that to allow employees in the competitive classified service to run for offices which are usually sought for the purpose of earning a livelihood or advancing one's political career would interfere with the efficient and impartial administration of public business by exposing employees and the merit system to the same type of political activities and abuses inherent in a spoils system, which the merit system was designed to obviate. Obviously, the Legislature could conclude that campaigning for such offices would inevitably interfere with the employee-candidate's time, energy, and devotion to his official duties. No one acquainted with the demands of a campaign for a county office, such as clerk of court, would deny that such demands could, and most likely would, affect a candidate's regular job performance. Undoubtedly, the Legislature was not unaware of the probability that an employee seeking such an office could use the prestige of the office he was seeking or his state office to gain special treatment from his superiors—such as leaves of absence

and special work assignments—or that his campaign activities would promote or retard his advancement.

The prohibition in paragraph seven against taking part in the "management or affairs of any political party or in any political campaign" is limited to partisan activity. That the term "political party" restricts only partisan political activity has been argued above.

The term "political campaign" is used in the narrow partisan sense as referring to partisan politics. In the science of government matters, political have intimate relation with and to party policy—the partisan policy upon which offices are filled by election. Participation in the formation of this policy and the election thereon is all that is expressly barred by this provision. The purpose of the Merit System law is to insure the employee the right to retain his position on the merit of his work and not because of his political partisanship.

In *Heidtman* v. *City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138, the question was whether city firemen were taking part in "politics" when they circulated parts of an initiative petition seeking enactment of an ordinance to establish the three-platoon system in the fire department. The Ohio Court held that the word "politics" as used in their civil service law meant dealing with political affairs in a party sense, and that circulating parts of the initiative petition did not constitute taking part in politics as that term is used in civil service law. The Court arrived at its conclusion on the premise that since the statute refers to the solicitation of funds for political parties or candidates as well as political organizations, the expression "take part in politics" was intended to cover only politics embraced

in the party sense. The other reason was that prevalent politics had controlled the police and fire departments, and it was to prevent abuses and resulting evils in this field that the civil service law was passed, thus showing an intention to give the term politics the narrower meaning, which is consistent with the objective to be achieved by the civil service law.

Clearly the objective in prohibiting employees from taking part in a "political campaign" is to prevent the evils of partisan politics in state government. The usual, ordinary and generally accepted meaning of the term "political campaign" means party or partisan organization or campaign. Any claim of more must be grounded upon an unjustified ambiguity sought to be engrafted to warrant a desired construction.

The last part of paragraph seven provides "or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." Appellees contend the phrase "except to exercise his right as a citizen privately to express his opinion and to cast his vote" modifies only that phrase immediately preceding it "or shall take part in the management or affairs of any political party or in any political campaign."

A limiting clause in a statute should be restrained to the last antecedent unless the subject matter requires a different construction. *U. S. ex rel. Santarelli* v. *Hughes*, 116 F.2d 613, 616; *Mandell Bros., Inc.* v. *Federal Trade Commission*, 254 F.2d 18, 22, reversed in part 359 U.S. 385; *Buscaglia* v. *Bowie*, 139 F.2d 294, 296-297.

Appellees contend that the prohibition against taking part in the management or affairs of any political party or in any political campaign means any partisan political party or in any partisan political campaign and that the following limiting clause allows a state employee to be involved in the management or affairs of any partisan political party or in any partisan political campaign to the extent of privately expressing his opinion and expressly recognizes the inherent right of every citizen to exercise his right to vote. There certainly would be no limitation upon state employees in publicly stating their opinions on all non-partisan activity or partisan activity not concerned with the management or affairs of a partisan political party or a partisan political campaign.

It is clear that when the Oklahoma Legislature enacted these prohibited political activity provisions in 1959 they were aware of the holding in *Mitchell, supra*, that only partisan political activity prohibitions can be placed on state employees. The provisions of Section 818 have never been utilized to prohibit non-partisan political activity of state employees. To hold that the Legislature was not aware of the holding in *Mitchell* in enacting the provisions of Section 818, which appellants urge includes prohibitions against non-partisan political activity, would go against the presumption that the Legislature does not do a vain and useless thing.

As stated by the Court in *Lambur* v. *Yates*, 148 F.2d 137, 139:

> "All statutes must be given a sensible construction. The sole object of construction is to determine the legislative intent. Such intent must be found primarily

in the language of the statute itself; but when the language is ambiguous or the meaning is doubtful, the court should consider the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it as to effectuate and not destroy the spirit and force of the law and not to render it absurd."

See *American Tobacco Co.* v. *Wreckmeister*, 207 U.S. 284, 293; *United States* v. *Katz*, 271 U.S. 354, 357; *United States* v. *Cooper Corporation*, 312 U.S 600, 605-606.

III.

APPELLANTS ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

Appellants contend they are denied the equal protection of the law in that they are denied the rights granted to all other citizens without justification for the distinction.

As stated by the Court in *Bagley* v. *Washington Township Hospital Dist.*, 55 Cal.Rptr. 401, 421 P.2d 409, 414:

"The government employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of public-conferred benefits despite a resulting qualification of constitutional rights."

The right of the State to prohibit the political activities of state employees has long been upheld. The Court in *Mitchell, supra,* explained it thusly at pages 102-103:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

In *State ex rel. McKittrick* v. *Kirby,* 349 Mo. 988, 163 S.W.2d 990, a provision of a city charter prohibiting the solicitation of political funds by employees in the classified service and prohibiting such employees from taking an active part in political campaigns, serving as officers of political organizations, circulating political petitions, working at polls, and the like, and providing that they may become candidates for public office only after resigning their

employment, was held not to constitute an unlawful interference with the right of freedom of speech as guaranteed by the Federal and State Constitutions, not to deprive the members of the classified service of their property and liberty without due process of law, and not to constitute discrimination in violation of the equal protection clause of the Fourteenth Amendment. The Court took the view that public employment may be conditioned upon reasonable limitation of the privilege of free speech and that a public office is not property in the constitutional sense and there is no inherent right to hold public office, such a right not being comprehended within the words "liberty" and "property" as they are used in the Fourteenth Amendment. The argument that the fact that the statute restricted certain political acivities on the part of members of the classified service without similarly curtailing the political activities of other city officials and employees constituted discrimination in violation of the equal protection clause was also rejected, the Court saying that the equal protection clause does not require exactly equal treatment of all citizens—the Legislature may create certain classes and make laws applicable to some but not all of the classes, provided that the principle of classification rests upon some real difference which bears a reasonable and just relation to the ends sought to be accomplished by the legislation. Examining the purposes and results of the charter provision in issue, the Court found that in general the line between the classified and unclassified civil service coincided with the classification of ministerial and policy-forming officers, and said that policy-forming officers should reflect the popular will and to do so must engage in politics, but that ministerial employees have nothing to do with forming public policy and

are best able to perform their duties when separated from the uncertainties of political influence, which requires that they be forbidden to take a public and prominent part in the activities of political parties and in election campaigns.

The Legislature in Oklahoma created two classes of state employees when the Merit System was created in 1959, classified employees who are under the Merit System and unclassified employees who are not. The classified employees as a class are subject to the prohibitions against partisan political activity as a policy decision of the Legislature. The distinction between the two classes in this regard is based upon the legislative intent to keep the evils of partisan politics out of state government. Inherent in this decision is the prerogative of the Legislature to decide what state employees are most subject to party political activity and what employees need to engage in politics to reflect the will of the citizens of the State. In addition, classified employees enjoy the benefits of the Merit System, while unclassified employees work in an environment dictated solely by the whims and caprices of their employers. Unclassified employees working for partially or fully federal funded agencies are subject to the Federal Hatch Act provisions in regard to their political activity. *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127.

The goal of preventing partisan politics from affecting the integrity and efficiency of state government while allowing the State to be responsive to the desires of its citizens compels the vesting of the Legislature with the authority to decide those state employees who are subject to the prohibitions in Section 818.

IV.
CONTENTIONS OF APPELLANTS

Appellants contend that the political activity provisions of Section 818 are unconstitutionally vague and overbroad. In citing precedent for their position appellants rely on a number of State Supreme Court decisions and lower Federal Court decisions. The Oregon, California and New Jersey decisions of *Fort* v. *Civil Service Commission*, 38 Cal. Rptr. 625, 392 P.2d 385; *Minielly* v. *State of Oregon*, 242 Ore. 470, 411 P.2d 69; *Kinnear* v. *City and County of San Francisco*, 38 Cal. Rtpr. 631, 392 P.2d 391; *Destefano* v. *Wilson*, 96 N.J. Super. 592, 122 A.2d 682; held political activity prohibitions to be invalid for overbreadth reasons. We have previously set forth argument showing that Section 818 political activity prohibitions are narrowly drawn to prohibit partisan political activity.

In *Gray* v. *City of Toledo*, 323 F.Supp. 574, the Court ruled part of the political activity prohibitions invalid as being overbroad, but also upheld those restrictions that were narrowly drawn to prohibit partisan political activity. In so doing the Court examined the language of the prohibitions on a word-by-word basis. While the Court struck down language similar to that of Section 818, there was no showing that there was any authority vested in the agency responsible for enforcing those provisions to promulgate rules or regulations defining the meaning of the political activity prohibitions. Apparently, an individual subject to those provisions had no recourse to other definitive provisions nor was a system set up to provide same. We feel that the decision should be distinguished from the

case at bar for the reason that Section 818 is drawn to prohibit partisan political activity and the Court should look to extrinsic aids in determining the nature of the prohibitions. The facial language of Section 818 together with the rules promulgated by the State Personnel Board, circulars distributed by said Board, and the availability of advisory opinions from the Board adequately inform state employees that the prohibitions are against partisan political activity and what factual situations would fall within the prohibitions.

Both *Hobbs* v. *Thompson*, 448 F.2d 456, and *Mancuso* v. *Taft*, 341 F.Supp. 574, were cited by appellants in support of their contentions. The courts in those two cases also invalidated political activity restriction on the grounds of vagueness and overbreadth. The essence of their decision, though, is found in the body of the opinions. In *Hobbs* the Court discussed *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, and on page 472 stated:

> "This standard of review, with its almost wholesale deference to the legislature's judgment, would make strict overbreadth scrutiny of the Macon scheme impossible. *Mitchell*, in other words, held that a broad prophylactic rule against political activity—which, in the individual case, might proscribe conduct unrelated to a significant state interest—could be upheld so long as the legislature's overall judgment was premised on a rational basis. It is this approach in *Mitchell* which we think is no longer good law."

In *Mancuso* the Court also discussed the *Mitchell* decision and stated on page 581:

> "There comes a point where the vitality of a case, though that case has not been expressly overruled,

may be seen to have been vitiated by the force of subsequent decisions. I believe that point has been reached. In the conflict between adherence to the doctrine of stare decisis and my obligation to apply the Constitution as an organic document evolving with the society it governs, I conclude, after much troubling thought and concern, that the *Mitchell* standard of review, in justice, cannot be applied here."

Embodied in the decisions of the Courts in these two cases is the philosophy that they no longer have to follow this Court's decision in *Mitchell*. We urge that the Court's decision in *Mitchell* is still valid and that the prophylactic approach to prohibiting political activity, however mistated in *Hobbs*, is a valid approach to the problem. The constitutional freedoms of appellants are not proscribed in the approach taken by the State of Oklahoma in limiting their political activity.

The effort of the State in following the decisions in *Mitchell* and *Oklahoma* was the enactment of Section 818. The prohibitions contained therein were established to meet any procedural constitutional problems in following the prophylactic approach of *Mitchell*. Given the alternatives for procedurally establishing partisan political activities, this approach is as constitutionally valid as any other.

CONCLUSION

The District Court properly adhered to all constitutional principles governing prohibitions against state employees' involvement in partisan politics and all issues raised were properly decided. For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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March, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

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all parties required to be served, by mailing such true and correct copies, postage prepaid, this _____ day of _____, 1973.

_____

Mike D. Martin